

**TCEQ DOCKET NO. 2011-1684-UCR
SOAH DOCKET NO. 582-12-3195**

APPLICATION BY THE CITY OF	§	BEFORE THE
TYLER TO OBTAIN DUAL	§	
CERTIFICATION WITH A PORTION	§	
OF CCN NO.20694 AND TO AMEND	§	TEXAS COMMISSION ON
CCN NO. 20319, IN SMITH	§	
COUNTY, TEXAS,	§	
APPLICATION NO. 37037-C	§	ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR’S REPLY TO EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S PROPOSAL FOR DECISION**

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or commission) files this Reply to Exceptions to the Administrative Law Judge’s Proposal for Decision (PFD) filed by the City of Tyler (City) in the matter concerning its application to obtain dual certification with Tall Timbers Utility Company, Inc. (Tall Timbers). The Executive Director would show the following in support of his recommendation that the commission adopt the PFD and accompanying Findings of Fact and Conclusions of Law as submitted by the Administrative Law Judge (ALJ).

I. The City’s Dispute with Tall Timbers Regarding Capacity Fee Refunds Is a Matter of Enforcement and Not a Matter of Adequacy of Service

The methodology by which a retail public utility sets and collects rates and fees is not a factor in determining adequacy of service.¹ The City inaccurately asserts that a billing dispute constitutes a failure on the part of a retail public utility to provide adequate service to its customer base. In support of its argument, the City states that, in the instance of a utility failing to comply with an order to refund fees, “the Commission could revoke the Certificate of Convenience and Necessity (CCN) or allow another retail public utility to provide service.”² Further, the City argues that by recommending denial of the City’s application to provide service within Tall Timbers’ certificated service area

¹ See 30 Tex. Admin. Code § 291.94.

² City of Tyler’s Exceptions to the Proposal for Decision and Proposed Order and Motion to Reopen the Record at 6-7 [hereinafter Tyler’s Exceptions].

in light of Tall Timbers’ continued failure to abide by the City’s order, the Commission is effectively telling “investor owned utilities that they are free to ignore municipal regulation with impunity[.]”³ These assertions are simply incorrect. The City, like the TCEQ, has options to enforce the requirements or terms of its orders. When a utility fails to comply with a TCEQ enforcement order, the TCEQ may refer the matter to the Attorney General of the State of Texas to seek relief in state district court.⁴ Likewise, the City of Tyler may opt to pursue compliance with its order through district court or some other judicial avenue. The Executive Director cannot speculate as to why the City has chosen not to pursue this matter further. The Executive Director can, however, maintain his position that whether the City obtains compliance with the order has no bearing on whether Tall Timbers is currently providing continuous and adequate service to its customer base as it is required to do under Tex. Water Code § 13.250.

II. Alleged Violations of a Domestic Waste Discharge Permit Alone Do Not Constitute a Failure to Provide Adequate Service

The City contends that violations by Tall Timbers of its municipal waste discharge permit constitute a failure on the part of Tall Timbers to provide adequate service in its service area.⁵ While no definition of “adequate sewer service” is provided in Chapter 13 of the Texas Water Code or the commission’s rules, the rules do provide some guidance on the subject. Section 291.94, titled “Adequacy of Sewer Service” contains two subsections titled “Sufficiency of Service” and “Sufficiency of Treatment[.]” The “Sufficiency of Service” subsection contains no requirements for or reference to the treatment of wastewater.⁶ The “Sufficiency of Treatment” subsection contains the rather circular requirement that retail public sewer service providers maintain treatment facilities in accordance with the laws and regulations of the State of Texas.⁷ Whatever role maintenance of treatment facilities plays in determining whether currently provided service is adequate, the record in this case does not indicated that any alleged

³ *Id.*, at 7.

⁴ 30 TEX. ADMIN CODE § 70.5.

⁵ Tyler’s Exceptions at 8.

⁶ See TEX. ADMIN CODE § 291.94.

⁷ *Id.*

violations of Tall Timbers domestic waste discharge permit has resulted in an actual failure on the part of Tall Timbers to provide adequate service to its customers.

III. Capacity to Treat Future Contributions to a Wastewater Treatment Facility is Irrelevant to Whether Current Service is Adequate

The Texas Water Code and the commission's rules require a finding that service *currently* provided in a requested CCN area is not adequate in order for the commission to grant a retail public utility the right to provide service in a requested area.⁸ The City contends that because Tall Timbers lacks the capacity to respond to future demands of its wastewater treatment facilities, it is not providing adequate service in the area requested for certification by the City.⁹ A witness for Tall Timbers testified at hearing that Tall Timbers has not received any recent requests for service which resulted in Tall Timbers' inability to provide service.¹⁰ Not only does Tall Timbers possess the ability to provide service to additional customers, according to the witness, Tall Timbers actually welcomes additional development in its service area.¹¹ Nevertheless, whether Tall Timbers currently possesses the capacity to treat wastewater from speculated future development is not a factor the commission may consider in determining whether service currently provided in a requested CCN area is adequate. In any event, Tall Timbers has demonstrated that current demands on its wastewater treatment facilities are well below its currently permitted treatment capacity.¹² Tall Timbers is required by law to expand its treatment capacity if customer demand nears and exceeds its current capacity,¹³ and is willing to do so should the need arise according to its witness.¹⁴

IV. Dual Certification Should Only Be Granted Upon Demonstration of a Need for Service from an Additional Utility

The City suggests that a utility should only be granted monopoly status when the public is best served by a single provider.¹⁵ Put another way, dual certification of a single

⁸ TEX. WATER CODE § 13.246(c)(1), 30 TEX. ADMIN CODE § 291.102(d)(1).

⁹ Tyler's Exceptions at 12.

¹⁰ Transcript of Proceedings Vol. 1 at 201 (Testimony of Greg Sorenson).

¹¹ *Id.*

¹² *Id.*, at Vol. 2 at 214-220 (testimony of Joe Wilkins).

¹³ 30 TEX. ADMIN CODE § 305.126(a).

¹⁴ Transcript of Proceedings Vol. 2 at 225 (testimony of Joe Wilkins).

¹⁵ Tyler's Exceptions at 13.

service area should only be granted to multiple utilities when the public convenience and necessity requires it. The Executive Director agrees and notes that such a requirement is precisely stated in commission rules.¹⁶ When a utility applies for certification to serve an area previously certificated to another utility, the burden is on requesting utility to demonstrate that a need exists for additional service.¹⁷ The Executive Director believes that without a demonstrable need for additional service, a single service provider is presumed to be in the best interest of the public.¹⁸

The Executive Director agrees with the Administrative Law Judge that the City has failed to prove that a need currently exists for service to be provided by an additional retail public utility in the requested area. For that reason alone, the exclusivity of Tall Timbers' CCN should be honored. There are, however, eight additional criteria the commission must consider in determining whether to grant a CCN application. While the City has succeeded in demonstrating that it can meet several of those criteria, it has also fallen short of proving that current service is inadequate, that there will be no adverse effect of granting the requested amendment on other retail public utilities, and that it is not feasible to obtain service from another retail public utility. The Executive Director believes these criteria to be critical in determining whether to grant dual certification.

IV. The Commission Should Adopt the ALJ's PFD in Full and Grant the Application in Part and Deny the Application in Part

The Executive Director has reviewed this application and performed numerous technical evaluations of its sufficiency. Following his review, the Executive Director determined that the portions of this application pertaining to service within an uncontested portion of Tall Timbers' CCN known as The Crossing and within areas currently outside of any authorized CCN service area satisfy all applicable statutory and regulatory requirements. The portions of this application pertaining to service within all other areas within Tall Timbers' CCN boundaries fails to satisfy the requirements of applicable statutes and commission rules. The Executive Director agrees with the ALJ's determination that the application should be granted in part and denied in part. The

¹⁶ 30 TEX. ADMIN CODE § 291.116.

¹⁷ *Id.*, at §§ 80.17(a), and 291.102(d)(1).

¹⁸ *See* TEX. WATER CODE § 13.001(b).

Executive Director respectfully recommends that the commission adopt the PFD and accompanying findings of fact and conclusions of law in full, and issue a corresponding amendment to Certificate of Convenience and Necessity No. 20319.

Respectfully submitted,

Texas Commission on Environmental
Quality

Zak Covar
Executive Director

Robert Martinez, Director
Environmental Law Division

A handwritten signature in black ink, appearing to read "James Aldredge", is enclosed in a rectangular box.

By _____
James Aldredge, Staff Attorney
Environmental Law Division
State Bar No. 24058514
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
512-239-2496
Representing the Executive Director of the
Texas Commission on Environmental
Quality

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013 an original and seven copies of the "Executive Director's Reply to Exceptions to the Administrative Law Judge's Proposal for Decision" was hand delivered to the Office of the Chief Clerk of the Texas Commission on Environmental Quality and filed electronically with the same, and that a copy was filed electronically with the State Office of Administrative Hearings and sent via electronic mail to the parties listed below.



James Aldredge, Staff Attorney
Environmental Law Division
State Bar No. 24058514

C. Joe Freeland
Mathews & Freeland, L.L.P.
P.O. Box 1568
Austin, Texas 78768-1568
jfreeland@mandf.com

Mark H. Zeppa
Law Offices of Mark H. Zeppa, P.C.
4833 Spicewood Springs Road, Ste. 202
Austin, Texas 78759-8436
mark@zeppalaw.com

James B. Murphy
Office of Public Interest Counsel
Texas Commission on Environmental Quality
P.O. Box 13087, MC-103
Austin, Texas 78711-3087
james.murphy@tceq.texas.gov